United States v. Star Construction Co., 186 F. 2d 666 11

United States v. United Drill & Tool Corp., 183 F. 2d 998 ---------- 11, 12

Young v. Godbe, 15 Wall. 562 ---------- 5

Statutes.

Renegotiation Act of 1951, Sec. 105 (b) (2), 65 Stat. 7, 50 U. S. C. App. Sec. 1215 (b) (2) ---------- 4

Second Renegotiation Act, Title VII, Rev. Act of 1943, 58 Stat. 78, 50 U. S. C. App. Sec. 1191:

Sec. 1191 (c) (5) (A) ---------- 2

Sec. 1191 (d) (5) ---------- 2

Sec. 1191 (i) (2) ---------- 3

COPY BOUND CLOSE IN CENTER

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 277.

THE UNITED STATES,
Petitioner,

v.

MORRIS ABRAMS and HOWARD ABRAMS,
Individually and as Co-Partners d.b.a.
Curtis Key Company,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Court of Appeals is part of the Record (19-23).

JURISDICTION.

The jurisdictional requisites are as set forth in the Petition.

QUESTION PRESENTED.

Do the Federal Courts have power to fix the rate of interest, in actions before them to recover a renegotiation refund under the Second Renegotiation Act (1943), or are they bound by a regulation of the War Contracts Price

Adjustment Board, when no power is given to the Board by the statute, to make such regulation?

STATUTES AND REGULATIONS INVOLVED.

A portion of the Second Renegotiation Act is accurately set forth in the Petition. The statute contains no provision for the payment of interest. The statute confers upon the Board no broad or general power to make regulations; the only authority in the Act, to issue regulations is as follows: (Title VII, Rev. Act of 1943, 58 Stat. 78, 50 U. S. C. App., Sec. 1191).

> Sec. 1191 (c) (5) (A). "Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulation prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this section. In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. * * *"
>
> Sec. 1191 (d) (5). "* * * The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the

COPY BOUND CLOSE IN CENTER

various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. * * *"

Sec. 1191 (i) (2). "The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7)."

None of the sections referred to relate to interest.

STATEMENT.

On October 15, 1945, the War Contracts Price Adjustment Board issued a unilateral order (R 8-9) to Respondents to refund, for the year ending January 31, 1944, an amount which, after tax credit and an amount withheld from Respondents, was $50,152.72. This order was appealed by Respondents to the Tax Court.

On February 13, 1950, four years and four months after this order, Petitioner brought suit in the Northern District of Ohio for the principal amount due, and also for interest at the rate of 6% per annum (R. 2-4). Respondents' Answer (R. 9-10) set forth that they were entitled to a deduction from the renegotiation refund, for a respread of special-amortization costs, and that their appeal was pending in the Tax Court. They asked further that the interest rate be fixed at 2½% per annum as the proper damage to Petitioner for the loss of the use of the money. Within five months after the filing of the action Respondents paid to the Government the principal amount of the unilateral order. On February 19, 1951, the District Court, upon undisputed facts (R. 12), entered judgment in favor

of Petitioner in the sum of $6,348.14, being interest at 3% per annum to the date of payment.

Petitioner appealed this judgment to the Court of Appeals for the Sixth Circuit and that Court affirmed the District Court, for the reasons set forth in its opinion (R. 19-23).

REASONS FOR DENYING THE WRIT.

1. The issue involves only the Second Renegotiation Act of 1943, and profits made before December 31, 1945. The present Renegotiation Act of 1951 provides (50 U. S. C. App. Sec. 1215 (b) (2)) that renegotiation refunds shall bear interest at 4% per annum, so that the question here raised has no bearing upon renegotiation under the modern Act. While there doubtless are a considerable number of cases still in litigation arising under the old Act, the question of the rate of interest in those cases is merely incidental and the main issues are those as to the principal amount due. Of the reported Court of Appeals cases, the instant case is the only one in which the question of the rate of interest became the only issue. This is the only case in which a manufacturer has been compelled to appear in the Court of Appeals or in this Court, upon this question alone. As Petitioner's Petition says, at page 12: "The judicial determination of the applicable interest return is generally only perfunctory and incidental to the determination of more important issues."

In each of the pending cases, as they come before their respective Courts, and are determined on their real issues, those Courts should and will, in the exercise of their judicial discretion, fix the proper interest rate, to be paid in that case. The decision of the Court of Appeals for the Sixth Circuit, and of the other Courts of Appeals which have held similarly, do not fix any general rate of interest

COPY BOUND CLOSE IN CENTER

to be applied. Their holdings are only that it is within the proper discretion of a Trial Court to fix the rate of interest in each case, under long established principles.

We submit that it is improbable that any manufacturer will engage in this kind of litigation with the Government, unless he has substantial differences as to the principal amount due, and that under the decision of the Court of Appeals for the Sixth Circuit, and those of three other Circuits, and many District Courts, such a manufacturer will have no assurance that the rate of interest adjudged against him will be any particular rate. It seems unrealistic to suggest, as does the Petition on page 12, that the decision in this case will "require numerous suits in a great number of District Courts merely to litigate the interest due."

Petitioner argues that fixing interest rate at 6% will encourage voluntary payment. Since we are dealing with profits and orders made many years ago, it would seem that the decisions whether to make voluntary payment have already been made; they will not now be determined by our question.

In comparison with other questions presented to this Court, this issue as to interest rates, under a law long expired, seems of small and rapidly diminishing importance.

2. The decisions of this Court have long established the basic principle that interest is awarded to a plaintiff, as compensation for his damage in failing to have the use of the money. *Young vs. Godbe,* 15 Wall. 562, 565:

> "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of *compensation for the delay in payment.*" (Emphasis supplied.)

Royal Indemnity Company vs. United States, 313 U. S. 289, 295-7:

> "A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest *by way of damage for delay in payment of the principal,* after the due date. *And in the absence of any controlling statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage.* * * * Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment." (Emphasis supplied.)

The determination of the amount of these damages, for the loss of the use of the money, is, in the absence of applicable statute, within the sound discretion of the Courts, upon the facts presented to them. *Royal Indemnity Company vs. United States,* 313 U. S. 289, 296:

> "But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, *it is for the federal courts to determine according to their own criteria, the appropriate measure of damage,* expressed in terms of interest, for nonpayment of the amount found to be due. *Board of County Commissioners vs. United States,* 308 U. S. 343, 350, 352; *Young vs. Godbe, supra,* 565; cf. *Billings vs. United States,* 232 U. S. 261, 284 *et seq.*" (Emphasis supplied.)

With the exception of cases where the Congress has established a fixed rate of interest, this Court has adhered to the principle that no arbitrary or rigid rule as to the

COPY BOUND CLOSE IN CENTER

rate of interest should be established by the Courts. *Board of Commissioners vs. United States,* 308 U. S. 343, 350:

> "* * * In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from a federal law, thus implying a wish of Congress to collect what it deemed fairly owing according to the traditional notions of Anglo-American law, *this Court has chosen that rule as to interest which comports best with general notions of equity. United States vs. Sanborn,* 135 U. S. 271, 281; *Billings vs. United States,* 232 U. S. 261. *Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.*" (Emphasis supplied.)

The Journal Entry of the District Court (R. 12) shows that:

> "Statements of facts were made by both counsel and it was found that the facts stated by each counsel were admitted by counsel for the other party * * *. There being no dispute as to the facts, it was agreed between counsel for both parties that the question of the amount of said interest be submitted to this Court for determination upon the facts as stated by counsel."

The Court of Appeals said (R. 23):

> "It is not denied that the Government during this period had adequate sources of credit through which it could obtain money at 3% interest."

The Court might well have said, as a matter of common knowledge, and judicial notice, that the Government could and did obtain billions of dollars at 2½% or less. Petitioner argues that there should be added the cost of Government "floating and servicing its loan." It might again be judicially noticed that such cost is a very small

fraction of 1%. We submit that there has not been shown any abuse of discretion by the Courts below.

The Second Renegotiation Act conferred upon the Board authority to issue regulations on certain specified and particular matters. These are set forth in this Brief under "Statutes and Regulations Involved." No authority was conferred to make a regulation as to interest rate. Unlike many other Acts of Congress, this Act contained no provisions giving general authority to issue regulations appropriate for enforcement of the Act. That the Congress specifically expressed and enumerated the powers as to regulation, which it wished to give to the Board, and did not include any general authority to make regulations other than those specified, negatives the argument that Congress meant to take from the Courts their usual and established power as to rates of interest in cases before them.

Let it be granted that the policy of Congress was speedy collection; still it was a matter for the judgment of Congress as to what was the desirable means of implementing such policy. Congress *might* have imposed a high interest rate, or it *might* have given power to the Board to issue a regulation fixing an interest rate, but it did neither. When finally it did fix an interest rate in the statute, it fixed it at 4%, thus indicating that it did not choose to try to enforce speedy collection by means of a high interest rate.

The Board obviously felt that an interest rate should have been fixed and that it should be a high one. Therefore, it assumed to issue a Regulation, in this field, in which Congress had failed to give it any authority to regulate. In the absence of such authority we believe the Regulation not to be binding upon the Courts.

COPY BOUND CLOSE IN CENTER

Our question is not one of a regulation interpreting ambiguous or doubtful words or phrases in the Act. Here the Act contained no word or phrase relating to interest. This Regulation was not interpretation but legislation—and legislation in a field as to which no power had been granted by Congress. The distinction was set forth by this Court in *Koshland vs. Helvering*, 298 U. S. 441, 446:

> "* * * Where the Act *uses ambiguous terms, or is of doubtful construction, a clarifying regulation* or one indicating the method of its application to specific cases *not only is permissible but is to be given great weight* by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. *But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.*" (Emphasis supplied.)

See also *Social Security Board v. Nierotko*, 327 U. S. 358, 369-370; *Miller v. United States*, 294 U. S. 435, 439-440; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 610; *Iselin v. United States*, 270 U. S. 245, 250-251; *United States v. Standard Brewery, Inc.*, 251 U. S. 210, 219-220.

Petitioner makes some argument that, even if the regulation had been invalid before an extension or amendment of the Act in 1945, it then became valid because of a "tacit approval." The only Supreme Court cases cited for this argument deal solely with the interpretation of ambiguous or doubtful language in the statute; this is quite a different question from ours, where there is no language to interpret, and where the Board had attempted to add to, its powers one which the statute had not given it but which had been left to the Courts.

In *Iselin v. United States*, 270 U. S. 245, 250-1, this Court said of a similar question as to an administrative rule:

> "* * * The statute was evidently drawn with care. *Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it* by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.
>
> "The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, § 800 (a), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, § 500 (a), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; *neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law.* Compare *United States v. Falk & Brother*, 204 U. S. 143; *National Lead Co. v. United States*, 252 U. S. 140, 146." (Emphasis supplied.)

When the Congress later decided to fix an interest rate, it fixed it at 4%. This makes it difficult to believe that, at a time when it amended the law, it intended to approve a 6% rate. Furthermore it indicates that the Congress did not wish to delegate to the administrative agency, the power to fix the interest rate.

COPY BOUND CLOSE IN CENTER

The Courts of Appeals of three Circuits have had this question presented to them, and have sustained the power of the Courts to fix a proper interest rate. *United States v. Bonnell,* 180 F. 2d 145 (C. A. 9); *United States v. United Drill & Tool Corporation,* 183 F. 2d 998 (Court of Appeals for the District of Columbia) and the instant case in the Sixth Circuit. In a fourth case, *United States v. Star Construction Company, Inc.,* 186 F. 2d 666, the Court of Appeals for the Tenth Circuit held, on an issue as to the date from which interest should begin, that the allowance of interest "rested in the discretion of the Trial Court." A number of District Courts have fixed interest rates at lower than 6%.[1]

The only Court of Appeals decision at variance with those four Courts of Appeals is *United States v. Philmac Manufacturing Co.,* 192 F. 2d 517, quoted in Petitioner's Brief. That opinion cites no authority for its novel ruling, and no reference is made to the *Iselin* case (*Iselin v. United States,* 270 U. S. 245). It contains no recognition of the narrow limitations of the power to issue regulations, conferred by the Renegotiation Act; neither the *Iselin* case nor the limitations of the statute as to regulations, were presented to that Court by the Brief for Philmac Manufacturing Company.

The reasoning, on principle, contained in that opinion, would seem to be well answered by established principles laid down by this Court, as quoted by the Court of Appeals of the Sixth Circuit in the instant case, especially at pages R. 20-22, and by the reasoning in the opinions, upon our point, of other Circuits. In the *Bonnell* case (*United*

---

[1] *United States v. Clark,* 72 F. Supp. 393 (1947); *United States v. Hopkins,* 95 F. Supp. 14 (1950); *United States v. American Metal Co.,* 86 F. Supp. 533 (1949) and *United States v. Edward Valves, Inc.,* 101 F. Supp. 559.

States v. Bonnell, 180 F. 2d 145, 148) the Court of Appeals for the Ninth Circuit said:

> *"This contention is without merit because the regulations are not an administrative interpretation or construction of provisions in the Act. The Act is silent as to the allowance of interest on the recovery of excessive profits.* * * * We think the Court had discretion in the amount of interest to be allowed and that the exercise thereof was not abused." (Emphasis supplied.)

In the *United Drill & Tool Corporation* case (*United States v. United Drill & Tool Corporation,* 183 F. 2d 998, 1001) the Court of Appeals for the District of Columbia said:

> "The Government also contends that it is entitled to exact a relatively high rate of interest as a coercive measure to force speedy payment of the excess profits determined under the Act. *But this argument overlooks the nature of interest which is compensatory rather than punitive or coercive.* We cannot change interest from a means of compensation to a coercive or punitive measure, as the Government urges us to do, unless the statute so provides." (Emphasis supplied.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AMOS BURT THOMPSON,

Counsel for Respondents.

September 15, 1952.

COPY BOUND CLOSE IN CENTER